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ALEXANDER L. STEVAS,
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No. 82-983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES E. DUNCAN, APPELLANT

v.

HAROLD PECK, APPELLEE

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF OHIO

MOTION TO DISMISS

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QUESTIONS PRESENTED FOR REVIEW

May Appellant proceed on the within Appeal of this matter, to this Honorable Court, when a Petition on Writ of Certiorari would be the correct method for bringing this matter before the Court.

Is the holding, which found Ohio Revised Code Section 2715 et seq, Ohio's former Pre-judgment Attachment Statute unconstitutional, to be given retrospective application.

May Appellant, who has filed a Motion to Set Aside a Default Judgment under Ohio Civil Procedure Rule 60 (B), ignore the proper method for presenting Rule 60 (B) motions because Appellant claims a "Constitutional Question."

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STATEMENT OF THE CASE

This matter was originally heard on Appellant's Motion to Set Aside a Judgment under Rule 60 (B) of the Ohio Rules of Civil Procedure. Appellant's Motion is contained herein as Appendix 2. Attached as Appendix 1 is Ohio Civil Rule 60 (B).

No issues with regard to the validity of any statutes were raised in Appellant's Motion or Memorandum, which is attached thereto.

Ultimately, the lower court set aside the judgment, which action was appealed to the Court of Appeals for the First Appellate District, Hamilton County, Ohio. Upon briefs and oral arguments the Court of Appeals for the First Appellate District rendered the opinion which is in Appellant's Jurisdictional Statement, as Appendix 3, reversing the Common Pleas Court.

Appellant filed a Motion In Support of Jurisdiction to the Supreme Court of Ohio. The Court denied Appellant's Motion.

Appellant has now filed his Notice of Appeal with this Honorable Court.

STATEMENT OF FACTS

The origin of this matter was the commencement of a suit in Hamilton County Common Pleas Court on October 25, 1978, in which Harold Peck was Plaintiff and James E. Duncan was one of the Defendants. The Complaint was for money damages in the amount of $20,000.00.

On October 27, 1978 the Hamilton County Sheriff attached certain shares of stock belonging to James E. Duncan, which shares were later sold according to law. This prejudgment attachment was made under Ohio Revised Code Section 2715, which was in full force and effect at the time of the attachment and subsequent judgment.

(Later, *Peebles v. Clement* 63 OS 2d 314 (1980) found ORC Section 2715 et seq. to be invalid based upon decisions of this Court.)

Service of the complaint was in accord with the Ohio Rules of Civil Procedure. On May 29, 1979 the Court granted Harold Peck a default judgment. The shares were sold after judgment was granted.

A year later, Mr. Duncan filed a complaint in United States District Court claiming that the procedures followed in the Ohio courts gave rise to a Title 42 USC 1983 claim. That cause is presently before the United States Court of Appeals for the Sixth Circuit. Mr. Duncan is appealing the Summary Judgment granted to Mr. Peck in the District Court.

After filing the complaint in U.S. District Court, Mr. Duncan filed a Motion to Set Aside the Default Judgment in the Court of Common Pleas, Hamilton County, Ohio, under Ohio Rule 60 (B), [Appendix 2]. It is the action taken on the 60 (B) Motion which is presently before this Court.

On May 5, 1981 the matter was presented to the Common Pleas Court. After the hearing, at which no witnesses were called, the Court found that the judgment against Mr. Duncan should be set aside.

Thereafter, Mr. Peck appealed the decision to the Court of Appeals for the First Appellate District of Ohio. In that Court, for the first time, Mr. Duncan raised his "constitutional issues."

The Court of Appeals applied the rules applicable to Rule 60 (B) Motions. The lead case in Ohio, *G.T.E. Automatic Electric v A.R.C. Industries* 47 O. St. 2d 146 (1976) requires that one attempting to set aside a judgment under Rule (60) B [essentially the same as Federal Rule 60 (b)] show: 1) The grounds for the relief sought are covered under Rule 60 (B) 1 through 5; 2) The relief is sought within one year and is otherwise timely; and, 3) A meritorious claim or defense to the complaint is shown. Appellant met none of those requirements. To be successful, under Rule 60 (B), Appellant must show all three.

On April 7, 1982 the Court of Appeals reversed the decision of the Common Pleas Court. In a portion of the Court's opinion the Court stated:

> "Careful review of the record before this court reveals that *defendant failed to introduce any evidence at the hearing on the motion that he has a meritorious defense*

or claim to present if the relief requested is granted. The assignments of error are well taken." (Emphasis added)

Thereafter, Mr. Duncan filed a Notice of Appeal and Memorandum in Support of Jurisdiction before the Supreme Court of Ohio.

By order of September 15, 1982 the Supreme Court of Ohio overruled Mr. Duncan's Memorandum in Support of Jurisdiction and found the existence of no substantial constitutional question. It is from the finding of the Supreme Court of Ohio that Mr. Duncan has filed a Notice of Appeal to the United States Supreme Court.

Appellee's issues, differ substantially from Appellant's issues. Appellee's issues are listed as follows:

1. Appellant has filed a Notice of Appeal to this Court when a Petition for Certiorari would have been the proper means of proceeding.

2. The finding which held the Ohio Pre-judgment attachment Statute to be unconstitutional occurred after the attachment and final judgment against Mr. Duncan and the finding is not retroactive.

3. The Appellant, himself, chose to rely upon Ohio Civil Rule 60 (B). Appellant cannot escape the consequences of his own act by raising "constitutional issues," not raised in the lower Courts and at the same time avoid the clear requirements of Rule 60 (B) practice.

Each argument will be dealt with in turn.

Appellant's arguments will not be directly answered, as they are not generally relevant to the issues and the allegations made by Appellant within those arguments are satisfactorily answered by Appellee's arguments.

ARGUMENT I

APPELLANT HAS FILED AN APPEAL TO THIS HONORABLE COURT RATHER THAN A PETITION IN SUPPORT OF A WRIT OF CERTIORARI AS REQUIRED.

Appellant has no right of appeal and Appellant's only means of bringing this matter to the Supreme Court of the United States would be through a Petition for Certiorari.

Rule 10.2, of the Rules of this Court, states in part, "The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the date of its entry, and *shall specify the statute or statutes under which the appeal to this court is taken."* (Emphasis added)

28 USC 2104 states:

"An appeal to the Supreme Court from a State Court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a Court of the United States."

Clearly, no statute or statutes have been set forth in Appellant's Notice of Appeal to the Supreme Court which would grant Appellant the right of direct appeal. Furthermore, Appellee's review of the statutes authorizing direct appeal would indicate that such direct appeal is not authorized and would not be proper.

ARGUMENT II

THE HOLDING OF OHIO REVISED CODE SECTION 2715 INVALID IS NOT RETROSPECTIVE SUCH THAT IT WOULD AFFECT PRE-JUDGMENT ATTACHMENTS WHICH WERE CARRIED OUT AND COMPLETED PRIOR TO THE DATE ON WHICH THE STATUTE WAS INVALIDATED.

Mr. Duncan has essentially argued that 1) The decision of this court in *Sniadach v. Family Finance Corporation* 395 U.S. 337 (1969) voided Ohio Revised Code Chapter 2715 at that time, because decisions of the United States Supreme Court are binding on all the states when decided; and 2) That even if the earlier decisions of the Supreme Court did not render the Ohio prejudgment attachment invalid, the decision in *Peebles* supra. in which the Ohio Supreme Court struck down the attachment statute, is retrospective in its application.

We will deal very rapidly with the first proposition. "Parties may rely on State statutes until such procedures are specifically overturned, even though a Supreme Court decision may have rendered their validity questionable." *Kacher v.*

Pittsburg National Bank 545 F. 2d 842 (3rd Circuit 1976)

With regard to the second issue, whether or not the holding in *Peebles* supra. should be prospective or retrospective, the Court is reminded that the attachment, the sheriff's sale and the default judgment were all complete prior to the decisions in *Peebles* supra.

Those Courts which have determined whether findings with regard to pre-judgment attachment statutes should be prospective or retrospective, have been uniform in finding that the decisions are prospective only.

The Court in *Kacher v. Pittsburg National Bank* 545 F. 2d 842 (3rd Circuit 1976) stated:

> "Giving *Fuentes'*[1] a retroactive effect is not only harsh and impracticable, but as Justice Clark . . . incisively stated, 'A retrospective application of *Fuentes v. Shevin,* supra., would work an injustice and a hardship upon [parties] who have lawfully acquired vested rights in the form of their state judgments.'"

Welsh v. Kinchla 577 F. 2d 767 (1st Cir., 1978) is identical with the fact situation in the instant matter, except that the property attached in *Welsh* was real estate. After the attachment in *Welsh* supra., the state law upon which the attachment was made was declared invalid.

The Court noted that "while the judgment *was prospective as to others,* it provided for relief to the immediate parties . . ." (Emphasis added) The Court went on to state:

> "In line with other decisions applying *Fuentes* to pretrial attachment statutes, *the court limited the effects of its judgment to parties before the court,* parties in *similar suits then pending,* and *attachments entered after the date* of its order . . ." (Emphasis added)

It would seem that the uniform opinion of the circuits, is that the attachment statutes which have been declared unconstitutional are not retrospective.

[1] 407 U.S. 67 (1972) this case is one of the lead cases decided by the Supreme Court overruling pre-judgment attachment statutes which give insufficient notice of attachment.

ARGUMENT III

A COURT HAS THE DESCRETION UNDER OHIO RULE 60 (B), TO EITHER SET ASIDE A DEFAULT JUDGMENT OR DISMISS A MOTION TO SET ASIDE BASED SOLELY UPON AFFIDAVITS AND DOCUMENTS ATTACHED TO THE MOTION. HOWEVER, ONCE THE COURT DETERMINES THAT A HEARING IS NECESSARY, THE MOVANT HAS THE BURDEN OF PUTTING FORWARD EVIDENCE AT THE HEARING, TO SHOW THAT THE MOVANT FITS WITHIN THE THREE REQUIREMENTS OF *GTE AUTOMATIC ELECTRIC v. ARC INDUSTRIES,* 47 O. St. 2d 146 (1976).

After having received memoranda and affidavits from both sides on Appellant's Motion to Set Aside, the court set this matter for hearing on May 5, 1981.

At that time Appellant's counsel argued the Motion to Set Aside, on behalf of Mr. Duncan, but called no witnesses and offered no evidence to the court.

Appellee indicated in open court that he had had witnesses ready, but did not call them in response to Appellant's failure to present any evidence.

The *only* matter before the court, supporting the Motion to Set Aside, is in Mr. Duncan's affidavit filed with the original Motion to Set Aside.

A movant is not automatically entitled to relief from a judgment or to a hearing. A movant must affirmatively show that he has a right to relief, or at the very least that he has the right to a hearing. *Adomeit v. Baltimore,* 39 O. App. 2d 97 (1974).

Bates and Springer, Inc. v. Stallworth 56 O. App. 2d 223, 382 N.E. 2d 1179 (8th Dist., 1978) sets forth the method for proceeding on 60 (B) motions. *Bates* supra. states that the court can 1) grant or 2) deny the motion, based upon the memos and filings or 3) it can hold a hearing. Once the Court decides that a hearing is necessary, the movant *must move forward with evidence presented at the hearing* to support the motion. Mr. Duncan failed to put forth any evidence at the hearing. Having chosen to proceed under Ohio Rule 60 (B), Mr. Duncan now wants to be excused from following the requirements in 60 (B) motions.

chosen to proceed under Ohio Rule 60 (B), Mr. Duncan now wants to be excused from following the requirements in 60 (B) motions.

The *Bates* Court stated:

> "If the trial court exercises its discretion and grants a hearing on the motion, any appeal taken from the courts action thereon is *not* decided upon the material submitted with the motion, but whether the *evidence introduced at the hearing* satisfies the three requirements of GTE." *Bates,* supra. at 228-229. (Emphasis added)

This requirement has been continued in a more recent case, *Mt. Olive Baptist Church v. Pipkins Paints,* 64 O. App. 2d 285 (1979), in which the court stated:

> "Where the trial court grants a hearing to determine the appropriateness of the motion, evidence *must* be introduced at the hearing to satisfy the three pronged test announced in *GTE Automatic Electric v. ARC Industries." Mt. Olive Baptist Church,* Supra. at 288. (Emphasis added)

The Court further said:

> "Once the evidentiary hearing is held, a *judgment* must be supported by evidence introduced at the hearing." *Mt. Olive Baptist Church,* supra. at 289. (Emphasis added)

In this cause, Duncan chose to present no evidence at the hearing.

The Court of Appeals followed *Bates and Springer, Inc.,* supra., and held that the movant had the burden of presenting evidence, if a hearing were held.

Further, it is clear that even Appellee's affidavit, the only "evidence" presented, failed to meet the three requirements of the *G.T.E.* supra. test.

Under Civ. R. 60 (B), Motions to Set Aside must be filed in a timely manner and if brought under 60 (B)(1), (2) or (3) the motion must be brought within one year from the date of the final entry.

Appellant's motion does not indicate upon which section of 60 (B) Appellant relying. However, it is clear from reading *Doddridge v. FitzPatrick,* 53 O.S. 2d 9 (1978) that a motion to

set aside under Rule 60 (B), for failure to receive service of summons and having no actual knowledge of the suit is a 60 (B)(1) motion.

If *Doddridge*, supra. is correct, the motion in this cause was also a 60 (B)(1) motion and had to have been brought within one year of the date of the final entry. Appellant's motion was not filed until July 3, 1980, more than one year after the date of the final entry and several months after Appellant admits he knew of the judgment.

Appellant therefore relied upon Rule 60 (B)(5).

> "Civ. R. 60 (B)(5) which allows relief for 'any other reason justifying relief from the judgment' is a catch-all provision, but it is *not* to be used as a substitute for Civ. R. 60 (B)(1), (2) or (3) when it is too late to seek relief under these provisions." *Adomeit v. Baltimore*, 39 O. App. 2d 97, 105 (1974). (Emphasis added)

Yet, that was exactly what Appellant attempted to do. As stated by Appellant's own counsel, in oral argument to the lower court:

> "We have pursued 60 (B)(5) because of the fact that our motion to set aside the default judgment was filed more than a year after the judgment was rendered; and for that reason we are proceeding under that catch-all provision this morning; . . ." (Tp.5) (Emphasis added)

Appellant proceeded under 60 (B)(5) simply because 60 (B)(1) was no longer available. "Although Civ. R. 60 (B)(5) is frequently referred to as the 'catch-all' provision, relief on this ground is to be granted only in extraordinary situations where the interest of justice calls for it." *Mt. Olive Baptist Church v. Pipkins Paints*, 64 O. App. 2d 285 (1979)

It must be remembered that Appellant did have knowledge of the action and judgment prior to the running of the one year time limit.

> "In the absence of any evidence explaining the delay, the movant has failed to demonstrate the timeliness of the motion." *Mt. Olive Baptist Church*, supra. at 289.

Clearly, the motion was neither filed within the required one year time limit, nor was it filed timely.

Even if testimony at a hearing were not required, the affidavit presented was not sufficient to meet Defendant's three prong test.

> "Vacation of such judgment, therefore, should not be granted lightly. The movant bears the burden of proving his allegation in support of this motion." *East Ohio Gas Company v. Walker*, 59 O. Ap. 2d 216 (1978).

Appellant neither met the *Bates and Springer, Inc.*, supra. requirements as to testimony, nor the three *G.T.E.* supra. requirements for setting aside the judgment.

CONCLUSION

For the within reasons, Appellant's Appeal should be dismissed as there is no substantial constitutional question and the issue was decided on an adequate non-Federal basis; as well as that this cause should not have been presented as an Appeal.

Respectfully submitted,

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Telephone: (513) 621-2260

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon Robert R. Ristaneo, 173 North Limestone Street, Lexington, Kentucky 40507 by regular U.S. Mail on this the 31st day of MARCH, 1982.

WILLIAM S. WYLER
Attorney for Plaintiff-Appellee

RULE 60. Relief from judgment or order
(A) . . .

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reason: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

APPENDIX-2

COURT OF COMMON PLEAS
CIVIL DIVISION
HAMILTON COUNTY, OHIO

Case No. A7809432

HAROLD PECK

Plaintiff

-vs.-

DUNCAN-GRAY MINING CO., et al

Defendants

MOTION TO (SIC) DEFENDANTS, JAMES E. DUNCAN AND EDWARD GRAY, TO SET ASIDE DEFAULT JUDGMENT

Now come Defendants, James E. Duncan and Edward Gray, and move the Court for an order, pursuant to Rule 60 (B), setting aside the default judgment entered against them and Duncan-Gray Mining Co., on May 29, 1979, in the amount of Twenty Thousand Dollars ($20,000.00), plus interest at the rate of six percent (6%) per annum from February 1, 1979 and costs. Defendants, James E. Duncan and Edward Gray, base this motion upon the following grounds:

1. Service of process was never perfected on any of the Defendants.

2. Because of the imperfection in the service of process, this Court never acquired jurisdiction to render a default judgment.

3. Because the Court did not have the prerequisite jurisdiction the default judgment is void.

4. This Court has the absolute inherent authority to set aside void judgments.

Respectfully submitted,

/s/ Wm. Stewart Mathews II
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Telephone: (513) 621-8810

/s/ Robert F. Ristaneo
504 Security Trust Building
Lexington, Kentucky 40507
Telephone: (606) 252-5441

Attorneys for Defendant:
James E. Duncan and Edward Gray

MEMORANDUM IN SUPPORT OF DEFENDANTS, JAMES E. DUNCAN AND EDWARD GRAY, MOTION TO SET ASIDE DEFAULT JUDGMENT

STATEMENT OF FACTS

On October 25, 1978, a Complaint was filed in the court of Common Pleas, Hamilton County, Ohio, being case number A7809432, wherein the Plaintiff, Harold Peck, alleged that he was entitled to stock in the Duncan-Gray Mining Company, Inc., having a value of Twenty Thousand Dollars ($20,000.00), from the three (3) named Defendants, pursuant to the terms of an oral contract. The Clerk of Courts for Hamilton County, Ohio, was directed to issue summons and service of process by certified mail upon Duncan-Gray Mining Co., Second Floor, Citizens Plaza, Louisville, Kentucky 40202; James E. Duncan, 1025 Dove Run Rd., Lexington, Kentucky 40502; and, Edward Gray, Rural Route #2, Lexington, Kentucky 40505.

On or about November 1, 1978, the Sheriff of Hamilton County seized 11,401 shares of stock issued by Safetech of which Duncan-Gray Mining Company, Inc. was a subsidiary, belonging to James E. Duncan. These shares were being held by John J. Robinson for James E. Duncan, in Robinson's office in Cincinnati, Ohio.

Thereafter, the certified mail process sent to all three (3) Defendants was returned by the post office. Each piece was marked "Addressee Unknown." Subsequently, Plaintiff filed an affidavit alleging that the preferred method of service had failed and that it was necessary to proceed with service by publication. Service by publication was completed, no responsive pleadings were filed by any Defendants and a default judgment was entered in favor of Plaintiff. All three (3) Defendants finally became aware of the existence of the default judgment rendered against them in either April or May, 1980.

Defendants are now requesting that the default judgment be set aside. This motion is brought pursuant to Ohio Civil Rule 60 (B) and the basis of the Motion is that none of the Defendants had actual notice of the pendency of this action nor did they have actual knowledge of the pendency of the action. Defendants maintain that, at the time of the filing of the lawsuit,

Plaintiff possessed the actual knowledge or the ability to acquire the actual knowledge necessary to perfect service by certified mail on all three (3) of the Defendants, as is reflected in the affidavits of each Defendant which are attached to their respective Motions.

STATEMENT OF LAW

Rule 60 (B) of the Ohio Rules of Civil Procedure, is the basis of the within Motion of Defendants, James E. Duncan and Edward Gray. Rule 60 (B) provides a party with a means by which he may seek relief from a final judgment and provides, in part, that: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: *** (5) any other reason justifying relief from judgment. The motion shall be made within a reasonable time***."

Ohio Civil Rule 60 (B)(5) is based upon Federal Rule of Civil Procedure 60 (B)(6) and is intended as a catch-all provision. As noted in the staff notes relating to Rule 60 (B)(5), "The provision reflects the inherent power of a court to relieve a person from the unjust operation of a judgment." This concept was recognized in the third paragraph of the syllabus in *GTE Automatic Electric v. ARC Industries,* 47 O.S. 2d 146, 1 0.0. 3d 86, 351 N.E. 2d 113, (1976), wherein the Court held:

> "Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits."

The second paragraph of the syllabus in *GTE Automatic Electric v. ARC Industries, supra.,* sets forth three conditions which must be met in order for a party to prevail on a motion brought under Rule 60(B):

1. The party must have a meritorious defense to present if relief is granted.

2. The party must be entitled to relief under one of the grounds stated in Civ. R. 60(B) (1) through (5).

3. The motion must be made within a reasonable time.

The provisions of Rule 60(B) represent a balance between the legal principle that there should be finality in every case, so

that once a judgment is entered, it should not be disturbed, and the requirements of fairness and justice, that given the proper circumstances, some final judgments should be reopened. See *Adomeit v. Baltimore*, 39 O. App. 2d 97, 68 O.O. 2d 251 (1974).

With respect to the first requirement of *GTE Automatic Electric v. ARC Industries, Inc., supra.*, Defendants, James E. Duncan and Edward Gray, submit that they have several meritorious defenses to the instant lawsuit, including factual defenses and defenses challenging the jurisdiction of this Court. Additionally, the Complaint alleges that Plaintiff was to be compensated by receiving shares of stock for his services pursuant to an oral contract. Such an allegation gives rise to a meritorious defense based upon the Ohio Statute of Frauds. In support of Defendants' claim that they have a meritorious defense to present if relief from the default judgment is granted pursuant to this Motion, Defendants offer their affidavits attached hereto and made a part hereof. Additionally, Defendants offer the affidavit of Parker W. Duncan, attached hereto and made a part hereof. Defendants also refer the Court to the affidavit of John J. Robinson which is attached to the Motion of Defendant, Duncan-Gray Mining Company, Inc., to Set Aside Default Judgment and to the other official records of the proceedings contained in the case jacket of this action, maintained by the Clerk of Courts of Hamilton County, Ohio. Defendants, James E. Duncan and Edward Gray have attached hereto their proposed Answer, should the relief sought be granted.

With respect to the second requirement of *GTE Automatic Electric v. ARC Industries, supra,* Defendants, James E. Duncan and Edward Gray maintain that they are entitled to relief from the judgment under Civ. R. 60(B)(5). Referring, again, to the affidavits and the court record, it is obvious that none of the three Defendants named in the lawsuit received any actual notice of the lawsuit, nor did they have actual knowledge of the lawsuit. Defendants, James E. Duncan and Edward Gray, first became aware of the existence of this lawsuit and judgment in April, 1980. The affidavits submitted herein further demonstrate that the addresses of all three Defendants named in the lawsuit were either known by Plaintiff or through the exercise of reasonable diligence, could have been ascertained by Plaintiff.

With respect to the third requirement of *GTE Automatic Electric v. ARC Industries, supra,* Defendants, James E. Duncan and Edward Gray, submit that this Motion is made within a reasonable time after they first became aware of the existence of the instant lawsuit and judgment, as demonstrated by the affidavits attached hereto.

It is, therefore, respectfully submitted that the instant case is one of those situations where the requirements of fairness and justice are such that the final judgment rendered herein should be set aside pursuant to Rule 60 (B) and this case reinstated upon the Court's docket.

Respectfully submitted,

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Telephone: (606) 252-5441

Attorneys for Defendants,
James E. Duncan and Edward Gray

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to Robert A. Pitcairn, Jr., Katz, Teller, Brant and Hild, Attorneys for Plaintiff, 1632 Carew Tower, Cincinnati, Ohio 45202; William S. Wyler, French, Marks, Short, Weiner & Valleau, Attorneys for Plaintiff, 700 First National Bank Building, Cincinnati, Ohio 45202; and James M. Moore, Lindhorst & Dreidame, Attorneys for Defendant, Duncan-Gray Mining Co., Inc., 1200 American Building, Cincinnati, Ohio 45202, by regular U.S. Mail, this third day of July, 1980.

/s/ Wm. Stewart Mathews II
Attorney for Defendants
James E. Duncan and Edward Gray